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IN THE

Supreme Court of the United States

October Term, 1954.

No. [redacted] 67

JAMES WARNER BELLAH,

Petitioner,

vs.

RUTH POWER-O'MALLEY WHITTLESEY, Mother on behalf of ANN DE LA POER BELLAH.

Petition for Writ of Certiorari to the District Court of Appeal, Second Appellate District, State of California.

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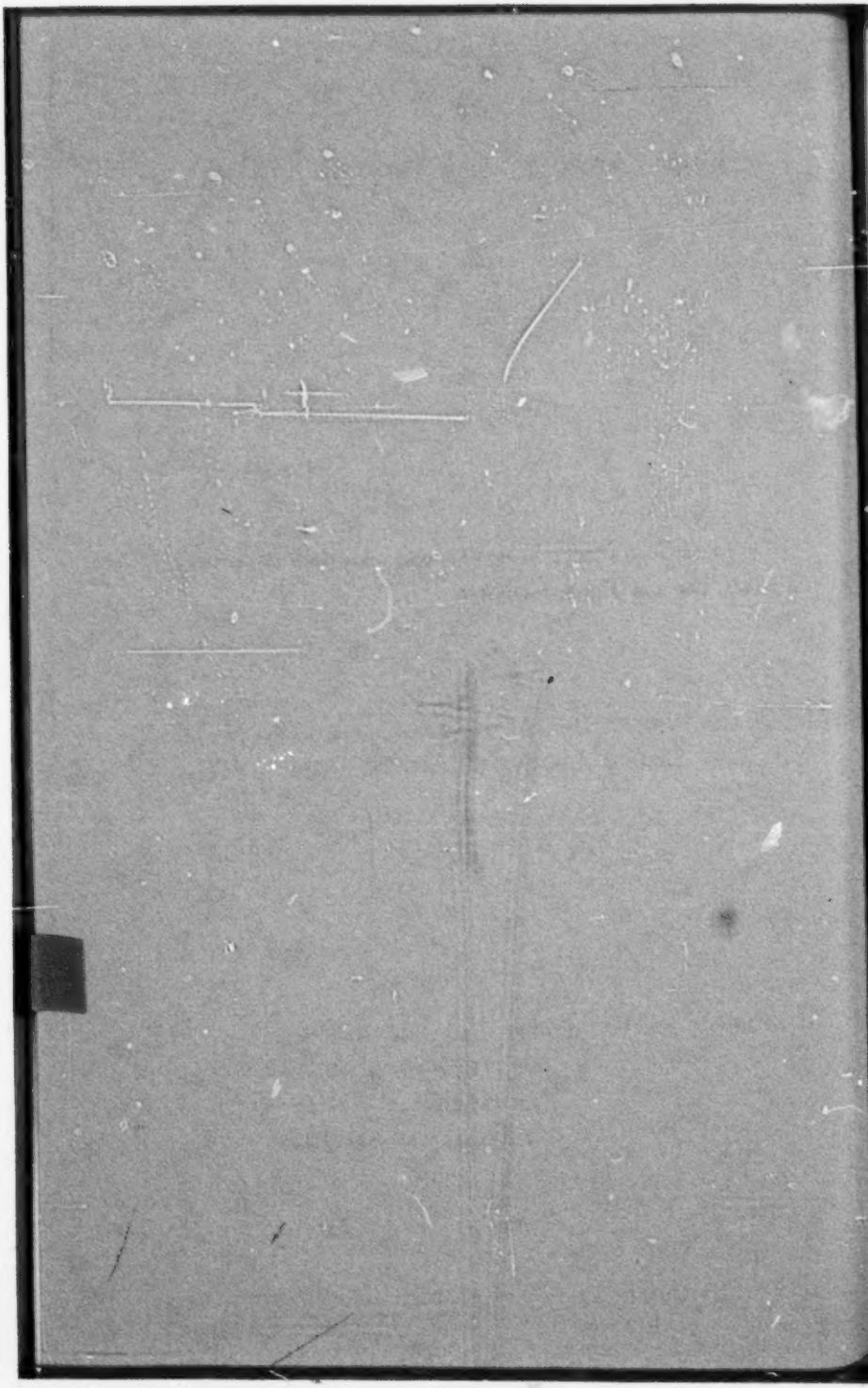

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JAMES WARNER BELLAH,

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RUTH POWER-O'MALLEY WHITTLESEY, Mother on behalf of ANN DE LA POER BELLAH.

Petition for Writ of Certiorari to the District Court of Appeal, Second Appellate District, State of California.

To the Honorable Earl Warren, Chief Justice of the United States, and to the Associate Justices of the United States Supreme Court.

Your Petitioner, James Warner Bellah, prays that a Writ of Certiorari issue to review the judgment of the District Court of Appeal, Second Appellate District, State of California, entered in the within case on March 14, 1955, and respectfully shows:

I.

Opinion Below.

The opinion below, that of the District Court of Appeal, Second Appellate District, State of California, is dated January 11, 1955, is entitled Ruth Power-O'Malley Whittlesey, Mother on behalf of Ann De La Poer Bellah, petitioner and appellant, vs. James Warner Bellah, respondent, and is officially reported at 130 A. C. A. (Advance California Reports), page 205. (Appx., *post* pp. 1-4.)

II.

Jurisdiction.

The jurisdiction of the Supreme Court is invoked under the provisions of Title 28 *United States Code,* Section 1257(3), since the invalidity of a State statute on the grounds of repugnancy to the Constitution of the United States is drawn in question.

III.

Statutes Involved.

This controversy revolves about the proper interpretation and application to Petitioner of the Uniform Reciprocal Enforcement of Support Act, which California has adopted. (*Cal. Code Civ. Proc.,* Secs. 1650 [illegible] 1690 incl.). A similar adaptation of this legislation is also the law of New York, under the title Uniform Support of Dependents Law. (*McKinney's Unconsolidated Laws,* Secs. 2111, *et seq.*) The named statutes of California and New York have been held to be sufficiently similar in character to permit of reciprocity between the two States. (*In re Susman,* 116 Cal. App. 2d 698, 700-701; *Hodges v. Hodges,* 202 Misc. 71, 108 N. Y. S. 2d 286).

IV.

Statement of the Case.

The essential facts are set forth with some particularity in the Opinion of the District Court of Appeal, and formed the basis for the decision. Said statement of facts is as follows:

> "James Warner Bellah, respondent in this case, was married to petitioner in Alexandria, Virginia, in 1937. One child was born of this marriage,—Ann De La Poer Bellah.
>
> "In 1940 petitioner, Mrs. Bellah, secured a decree of judicial separation from Mr. Bellah, and custody of the child, in the State of New York. In 1942 she was awarded a decree of absolute divorce from Mr. Bellah in the State of Nevada. She has since remarried. Her name now is Ruth Power-O'Malley Whittlesey.
>
> "By agreement of Mr. and Mrs. Bellah, then husband and wife, the Nevada decree incorporated a provision requiring Mr. Bellah to pay the child $25 a month for her support until her eighth birthday; $35 a month until her thirteenth birthday; and $50 a month until her twenty-first birthday or until her marriage or self-sustaining employment.
>
> "So far, as may be determined from the sketchy record in this case, Mr. Bellah has always made these payments.
>
> "In June of 1953 the mother, on behalf of the child, petitioned the courts of New York, under the uniform reciprocal enforcement of support laws of New York and California (Code of Civ. Proc., Secs. 1650-1690; and see *In re Susman,* 116 Cal. App. 2d 698) for an order requiring Mr. Bellah to increase his payments for the child to $250 a month.

"As the law provides, the Domestic Relations Court of the City of New York heard the petition in the first instance. That court ordered that the papers and testimony be forwarded to the proper court in California, and the judge made a notation on the papers that 'the sum of $250 per month for the support of the one child is recommended.'

"Mr. Bellah was then served with California process, the case came on duly for hearing in the Superior Court here, and was ordered dismissed. The mother, on behalf of the child, appeals from the order.

"It appears from the docket of the New York court that the petition was heard on an affidavit of non-service and the verified petition and testimony of the mother. The affidavit of non-service is by a police officer of the City of New York, 'that he cannot with due diligence locate or serve the respondent designated in the said process within the City of New York.' And it may fairly be said that the former Mrs. Bellah knew Mr. Bellah's address in California at all times."

V.

How Federal Question Is Presented.

In the Superior Court of Los Angeles county, the trial court in the matter, Petitioner herein, who was the defendant below, moved for a dismissal on the following ground [Rep. Tr. p. 11, lines 2-13]:

"Mr. Fox: (Counsel for Defendant) I previously moved the Court to dismiss the proceedings on the ground this court has no jurisdiction to hear this matter, that this court cannot pass on a decree of another state, and any action in connection with this petition in giving relief to the petitioner would in a

sense be denying the decree of the Nevada court, and that the defendant is not in default under the terms of the Nevada decree, and never has been, and the Nevada decree is still valid and subsisting.

The Court: I feel if you have a remedy it is in a civil action, not by Reciprocal.

I will dismiss it on that ground."

The decision of the California District Court of Appeal is the final decision in California in this matter, and expressly ruled on the constitutionality of the Uniform Reciprocal Enforcement of Support Act. It passed on the federal question of whether proper notice had been given to the defendant, and whether the service obtained upon the defendant granted him due process of law. (Dec. of Dist. Ct. of App., Appx., *post* p. 3). On March 9, 1955, the Supreme Court of California denied a hearing from the decision of said District Court of Appeal; and on March 14, 1955, the remittitur of the latter court issued.

VI.

Reasons for Granting of the Writ.

A. Importance of the Question.

The Uniform Reciprocal Enforcement of Support Act is of recent origin and its adoption by the great majority of our States is also of recent date. Those who have crusaded for the Act are of the opinion that this novel and ingenious piece of legislation has effectively and studiously avoided all foreseeable constitutional objections. Yet the appellate courts of only two states actually have had occasion to pass on the validity of this Act, or of its immediate predecessor. In both of these cases

constitutional objections were struck down. (*Smith v. Smith,* 125 A. C. A. 190, a decision of the District Court of Appeal of California, the intermediate appellate court, a hearing in the Supreme Court of California, however, having been denied; and *Duncan v. Smith,* 262 S. W. 2d 373, a decision of the Court of Appeals of Kentucky, its highest appellate court, where the 1950 version of the Uniform Reciprocal Enforcement of Support Act, rather then the later 1952 version of the Act, was sustained). To our knowledge, until this instant case, no review by the Supreme Court of the United States had been sought from either the California or the Kentucky decisions.

The invoking of the dual-jurisdiction features of the Act cuts across State lines and may affect citizens in every State of the nation. Even were it conceded that when applied in proper cases the Act is a beneficent piece of social legislation worthy of validating if no substantial constitutional defects are present, a critical look at the Act as it has been applied in the instant case may well reveal that it carries within itself the seeds of flagrant abuse and misuse. In this sense, at least, it is important that the Supreme Court review the judgment below.

B. As Applied to Petitioner by the Court Below, His Right to Equal Protection of the Laws Guaranteed Under the Fourteenth Amendment to the Constitution of the United States Would Be Denied.

It is recognized that the equal protection clause is violated as to the person affected by an arbitrary and unreasonable classification. (*Corwin, The Constitution,* p. 264, 1954, Princeton University Press; 12 Am. Jur. 157.)

Petitioner believes that the basic and declared purpose which justifies a State adopting the Uniform Reciprocal Enforcement of Support Act is to enforce the duty imposed by it for the support of wife and child against *absconding and fugitive fathers* crossing from one state line to another, and leaving the dependents *destitute.* (*Commissioner's Prefatory Notes* found in 9A *Uniform Laws Annotated*, 1954 Supp. 53, 61.)

It must be apparent that the Act was not intended to be applied to *all* fathers merely because of parenthood, and it would seem that particularly the Act was not intended to apply to fathers who have faithfully obeyed the specific order of a competent court directing payments for the support of their children.

The record in this case shows that at the time when the mother initiated proceedings in New York under the Act and obtained a "recommendation" from a Justice in New York City to the effect that Petitioner pay $250.00 a month for the support of his child, Petitioner had in fact been paying without default $50.00 a month for the support of the same child, as previously ordered by a competent tribunal in the State of Nevada, in proceedings instituted in that State by the mother herself. [Clk. Tr. p. 19].

It would be difficult to find a more obvious illustration of a factual situation *not intended* to be covered by the Reciprocal Act than the instant case.

A related facet of the equal protection of the laws phase of this case is that of imposing on Petitioner while a citizen of California, a liability for support fixed by New York (albeit admittedly in a preliminary manner by "recommendation"), which liability would not have

attached in California if the Reciprocal Act had not been invoked. (*cf., Commonwealth of Pennsylvania v. Mong,* 160 Ohio St. 455, 117 N. E. 2d 32.)

Under California law, the proper and perhaps the only way in which Petitioner could have been ordered to pay increased support for his daughter would be by virtue of an order of a competent court in an action for support, a procedure which was not adopted in this case. That, under California law it may not be certain whether such proceedings for a support order should be brought by the child or by the mother, or should be an independent action for support, or one to modify the support provisions of the Nevada divorce decree, does not detract from the basic principles stated. (*Dixon v. Dixon,* 216 Cal. 440; *Lewis v. Lewis,* 174 Cal. 336; *cf., Karminski v. Karminski,* 23 N. Y. S. 2d 141.)

The reciprocal acts contain no definable standard of liability, and as applied in the instant case would seem to be incomprehensible.

It is to be noted that the duties of support enforceable are "those imposed or imposable under the laws of any State where the alleged obligor was present during the period for which support is sought, or where the obligee was present when the failure to support commenced, at the election of the obligees." (Sec. 1670, *Cal. Code Civ. Proc.*) What duties of support would be enforceable in the instant case? According to the record, the offending father was not present in New York at any of the period for which support is sought, he having been a resident of California for several years. And if the obligee (the daughter?) was present in New York, when can it be said that the "failure to support" com-

menced? Can it be said that there was ever any "failure to support" if the father at all times lived up to the terms of the only valid order fixing support, to-wit the Nevada divorce decree? It is submitted that in the instant case the only valid election which could have been given the obligee would be in the state where the obligee was present, but in this regard it could not conceivably be found that there was any failure to support as long as the obligation under the support order had not been defaulted. Consequently, unless it be shown that there is a default in the Nevada decree, there can be affixed no blame on the Petitioner for failing to support his child. Of course there is always the privilege of modifying the Nevada decree, the right to which cannot be denied if properly followed, but this course purposely was not the course adopted by the mother and daughter against the Petitioner.

C. As Applied by the Decision Below, the Act Becomes an Instrument for Potential Abuse and Misuse in the Hands of Unscrupulous and Greedy Wives.

There is now in effect a Nevada court order under which Petitioner is obligated to support his child to the extent of $50.00 per month. The Reciprocal Act specifically recites that one order does not supersede an earlier order (*Cal. Code Civ. Proc.*, Sec. 1689). If allowed to proceed under this Act, the Superior Court of California likely would adopt the $250 per month "recommendation" of the New York court and issue its support order against Petitioner to that effect. There would then be in effect two valid support orders, with no apparent bar against the wife seeking further orders in other states to which Petitioner may later move and be found. The fact that a "credit" may be set up against

the latest order for payments under an earlier order or orders, does not lessen the jurisdictional and administrative anarchy created by the Act as interpreted below.

D. As Applied by the Court Below, Due Process Would be Denied to Petitioner.

"Due process" under the Fourteenth Amendment reduced to its simplest requisite calls for "fair play" as affecting the party to be charged with a personal judgment, order or decree. (*Griffin v. Griffin,* 327 U. S. 220; *Corwin, The Constitution,* p. 262, 1954, Princeton University Press.)

In the instant case, the exact California address of Petitioner being known to the tribunal in New York, "fair play" required at least that he be notified *in some manner* of the pending proceedings in New York, before its order was made on an *ex parte* basis.

In the instant case the Justice in New York City, the initiating court, "recommended" that the Petitioner be ordered to pay the sum of $250.00 per month. [Clk. Tr. p. 2]. It is to be noted this was not a mere administrative act, but a decision by a court, made after receiving certain evidence. It is submitted that this is a direct exercise of judicial authority over a party not within the jurisdiction of a court exercising that authority. The "recommendation" was made without having heard any testimony from petitioner. It is not enough to say that petitioner can still be heard by way of taking additional depositions. The proper time for him to be heard is before the "recommendation," and not afterwards.

That this basic pattern of the Act has disturbed even its devotees is evident from a discussion of the matter in 45 *Illinois Law Review* pages 252-260, from which the following is an excerpt:

> "But the notion of a court making a recommendation upon having heard only one side of the evidence disturbs some concept of fairness. If the drafters meant the court to 'recommend' disposition of the case on hearing only half of the evidence, there would be some due process doubts. If it was intended that the court should recommend whether petitioner made a good enough case to warrant continuance of the procedure, or recommend the credibility to be given petitioner's witnesses on the basis of the court's observations, then the problem is less serious. A construing court should prefer the latter construction. The procedure would function just as well without the provision; therefore, even if invalidated, the separability clause, Section 10, could be invoked to save the remainder of the procedure."

Nor will it suffice to argue that the "recommendation" is not a final, binding order until incorporated in a decree of the responding court. The fact remains that it is a finding made by a judge and having an obviously persuasive effect on the responding court's decision, and having been made prior to any evidence submitted by the defendant, adversely affects his right to present his evidence in an orderly fashion. There has indubitably been an exercise of a judicial function by the court of the State of New York, and this without even minimum jurisidiction over the Petitioner.

E. Orderly Process in the Administration of Law, If Not Rising to the Constitutional Dignity of "Due Process" Nevertheless Requires That a Party to be Charged With a Court Order be Accorded the Right to Confront and Cross-Examine the Adverse Party and Her Witnesses, Before the Judicial Decree or Pronouncement Is Made.

Whether the reciprocal acts grant such rights has obviously disturbed the exponents of this novel piece of legislation. Professor W. J. Brockelbank, one of the chief supporters of the Act, puts the point in the following manner:

> "Without doubt the testing by cross-examination is the greatest legal engine ever invented for the discovery of truth. No safeguard for testing the value of human statements is comparable to it. But the procedure under the Support Act has this particularity: *the plaintiff is usually absent in another state.* The question then becomes is there, under these circumstances, a proper substitute? Since procedure is not covered by the act, the responding court must be careful to follow the general law of procedure, and in particular the law of evidence. Normally the defendant has a right to cross-examine his opponent and his opponent's witnesses. Since they are not present this cannot be done. The court must therefore be careful to follow the statutory substitutes. Statutes exist for presenting of evidence by deposition and the requirements of notice and other procedural details must be satisfied. The official named in Section 12 whose duty it is to carry on the proceedings, will usually find at his disposal statutes covering discovery and interrogatories. . . ." (Emphasis ours.) (*"Multiple Interstate Enforcement of Family Support,"* 2 St. Louis Univ. L. J. 12, 22 Spring 1952.)

But the trouble with this exposition is that in the instant case no such rights equivalent to depositions or interrogatories were in fact furnished to defendant before the court in New York made its "recommendation." It might very well be that if the process were one whereby such a right of interrogation were given *before* such a "recommendation," a serious objection to the lack of fair play on the part of the Act would be overcome. The fact remains that the procedure in the instant case did not follow this course.

VII.

Conclusion.

Novel legislation begets novel problems. The highest appellate court of only one State, that of Kentucky, has had occasion directly to brush aside constitutional objections to the Act (and in that case the 1950 version of the Act, entitled Uniform Support of Dependents Act, was under review). Yet this new piece of legislation cutting across state lines and having a truly national operative effect, presents some basic constitutional defects. It would seem provident for the Supreme Court of the United States at this early stage to accept the opportunity of testing this novel piece of legislation against established constitutional safeguards.

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Dated May 5, 1955.

Respectfully submitted,

HARRY GRAHAM BALTER,

Counsel for Petitioner.

APPENDIX.

Opinion of the District Court of Appeal.

[Civ. No. 20362. Second Dist., Div. One. Jan. 11, 1955.]

Ruth Power-O'Malley Whittlesey, Appellant, v. James Warner Bellah, Respondent.

Appeal from an order of the Superior Court of Los Angeles County dismissing a proceeding under the Uniform Reciprocal Enforcement of Support Act. Elmer D. Doyle, Judge. Reversed.

Loeb & Loeb and Herman F. Selvin for Appellant.

Fox, Goldman & Kagon for Respondent.

DRAPEAU, *J.*—James Warner Bellah, respondent in this case, was married to petitioner in Alexandria, Virginia, in 1937. One child was born of this marriage, Ann De La Poer Bellah.

In 1940 petitioner, Mrs. Bellah, secured a decree of judicial separation from Mr. Bellah, and custody of the child, in the State of New York. In 1942, she was awarded a decree of absolute divorce from Mr. Bellah in the State of Nevada. She has since remarried. Her name now is Ruth Power-O'Malley Whittlesey.

By agreement of Mr. and Mrs. Bellah, then husband and wife, the Nevada decree incorporated a provision requiring Mr. Bellah to pay the child $25 a month for her support until her 8th birthday; $35 a month until her 13th birthday; and $50 a month until her 21st birthday or until her marriage or self-sustaining employment.

So far as may be determined from the sketchy record in this case, Mr. Bellah has always made these payments.

In June of 1953 the mother, on behalf of the child, petitioned the courts of New York, under the Uniform Reciprocal Enforcement of Support Laws of New York and California (Code Civ. Proc., §§1650-1690; and see *In re* Susman, 116 Cal. App. 2d 698 [254 P. 2d 161]) for an order requiring Mr. Bellah to increase his payments for the child to $250 a month.

As the law provides, the Domestic Relations Court of the City of New York heard the petition in the first instance. That court ordered that the papers and testimony be forwarded to the proper court in California, and the judge made a notation on the papers that "the sum of $250 per month for the support of the one child is recommended."

Mr. Bellah was then served with California process, the case came on duly for hearing in the superior court here, and was ordered dismissed. The mother, on behalf of the child appeals from the order.

The most serious question on appeal is Mr. Bellah's defense that he had no notice of the New York proceeding until he was served in the California proceeding; and that consequently he had no opportunity to test the testimony of the child's mother by cross-examination.

It appears from the docket of the New York court that the petition was heard on an affidavit of nonservice and the verified petition and testimony of the mother. The affidavit of nonservice is by a police officer of the City of New York, "that he cannot with due diligence locate or serve the respondent designated in the said process within the City of New York." And it may fairly be said that the former Mrs. Bellah knew Mr. Bellah's address in California at all times.

Mr. Bellah argues that before a citizen of this State may be subjected to the application of the reciprocal enforcement of support laws, if he can be found with reasonable diligence, he is entitled to such notice of the proceedings in the initiating sister state as will enable him to appear and defend there. And that in this case he has been deprived of the rights to appear in the court of first instance, to be represented by counsel in that court, to cross-examine witnesses adverse to him, and to test the legal sufficiency of that proceeding.

In the law of substituted service it is elementary that fair play requires that a defendant be given notice sufficient to apprise him of what is going on and an opportunity to defend. Anything less than that is a denial of due process of law. (People v. One 1941 Chrysler Sedan, 81 Cal. App. 2d 18 [183 P. 2d 368].) In this case it would have been a simple thing to have given Mr. Bellah actual notice of the New York proceedings. Proof that such notice was sent to him by mail, or was served upon him personally would have left a much more satisfactory record.

However, it seems to this court that it would be more in consonance with the public policy of this state as declared by the Legislature in the Uniform Reciprocal Enforcement of Support Law, and with the welfare of the child whose rights are here involved, to continue with this case, rather than to dismiss it.

An action for the future support of minor children is a personal one. Being personal it is transitory. (Dimon v. Dimon, 40 Cal. 2d 516, 525 [254 P. 2d 528].)

The application of the law of uniform reciprocal enforcement of support was given exhaustive study in Smith v. Smith, 125 Cal. App. 2d 154 [270 P. 2d 613]. In that

case Mr. Justice Vallée, speaking for the court, points out that the courts of this state do not abdicate any of their judicial power in deciding this sort of proceeding.

Therefore, the amount of support money required by the minor child in this case is entirely at large in this state. We are not bound by the recommendation of the New York court, or by the proof for the minor presented in that court.

And it may be presumed that the trial court in California will properly evaluate the proof as to the child's necessities with the ability of the father to pay, and with a judicial discretion that will not penalize the father for not having been able to cross-examine the mother. Moreover, he may yet cross-examine her in New York by deposition. (Smith v. Smith, *supra,* at p. 168.)

This precise question was argued in the Smith case, and it was held that despite the lack of notice to the defendant in that case of the initiatory proceeding in the sister state, California's court had jurisdiction to hear and determine the matter. Petition for a hearing of the Smith case was denied by our Supreme Court.

Mr. Bellah also argues that the Nevada decree until set aside or modified is the controlling order, and in effect binds the child. This argument overlooks the transitory character of these actions. Under the Reciprocal Enforcement Laws of New York and California, in this case the courts of California have jurisdiction to ascertain and enforce adequate support for this minor child. It is sufficient for jurisdiction that New York is the place of residence of the child, and that California is the place of residence of the father.

White, *P. J.*, and Doran, *J.*, concurred.

The order is reversed.

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Petitioner's contentions amount to nothing more than disagreement by him with the purposes sought to be achieved by reciprocal support acts. The wisdom of such acts, having been laid to rest by legislative action, is not a matter of judicial concern 6

II.

Since petitioner had, and availed himself of the opportunity to be fully heard before the trial court, no lack of due process exists 8

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9A Uniform Laws Annotated (1954 Supp.), pp. 61-64, Prefatory Note 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. .....

JAMES WARNER BELLAH,

Petitioner,

vs.

RUTH POWER-O'MALLEY WHITTLESEY, Mother on behalf of ANN DE LA POER BELLAH,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

Opinion Below.

The opinion of the Court below, that of the District Court of Appeal, Second Appellate District, State of California, is reported at 130 A. C. A. (Advance Cal. App.) 205, 278 P. 2d 511. After decision by the District Court of Appeal, a hearing in the Supreme Court of California was sought by petitioner and denied on March 9, 1955. [44 A. C. (Advance Cal.) No. 5, Minutes, p. 2; 278 P. 2d 511.]

II.
Jurisdiction.

Petitioner attempts to invoke jurisdiction here under 28 United States Code, Section 1257(3). There are, however, two fundamental, and we believe, decisive objections to this Court assuming jurisdiction.

1. The judgment below is not final within the purview of Supreme Court review. This action, brought under the Uniform Reciprocal Enforcement of Support Law of California [Code Civ. Proc., Secs. 1650 through 1690] and its counterpart in New York [McKinney's Unconsolidated Laws of New York, Secs. 2111 through 2120] was dismissed by the California trial court on the ground that a remedy did not lie under those laws. [R. 11.] The District Court of Appeal reversed the order of dismissal of the trial court. Under California law, such a reversal results in a new hearing in the trial court "and places the parties in the same position as if the case had never been tried." [*Erlin v. National Union Fire Insurance Co.*, 7 Cal. 2d 547, 549, 61 P. 2d 756, 757, and cases cited.] It is from that order of reversal that petitioner now seeks review here. But petitioner has plainly failed to take heed of the many decisions of this Court which hold that when a new trial or its equivalent is ordered by a state court, jurisdiction to review such order is lacking in this Court for want of a final judgment. [*Gospel Army v. City of Los Angeles*, 331 U. S. 543, 546, 91 L. Ed. 1662, 1665, 67 S. Ct. 1428; *Martinez v. International Banking Corp.*, 220 U. S. 214, 223-224, 55 L. Ed. 438, 31 S. Ct. 408; *Schlosser v. Hemphill*, 198 U. S. 173, 175-176, 49 L. Ed. 1000, 25 S. Ct. 654.]

2. Petitioner failed to raise timely and properly the constitutional question now advanced. Nowhere in the

proceedings before the trial court, or in the pleadings, is there any reference whatever to the equal protection or due process clause of the Fourteenth Amendment, or even to the Constitution itself. The record is completely bare of any mention, both in the trial court and before the District Court of Appeal of either clause of the Constitution upon which petitioner now relies. Where the record does not affirmatively show that the constitutional question sought to be reviewed was raised at the first available opportunity, as required under state law, this Court is without jurisdiction. [*Edelman v. California,* 344 U. S. 357, 358-359, 97 L. Ed. 387, 391, 73 S. Ct. 293, and cases there cited; *Hulbert v. City of Chicago,* 202 U. S. 275, 279-280, 50 L. Ed. 1026, 26 S. Ct. 617; *McGarrity v. Delaware River B. Comm.,* 292 U. S. 19, 20, 78 L. Ed. 1095, 1096, 54 S. Ct. 565.] California law requires a full and early presentation of the constitutional issue. [*Johnson v. State Bar,* 4 Cal. 2d 744, 758, 52 P. 2d 928, 934; *In re Anderson,* 18 Cal. App. 593, 594, 123 Pac. 972. See: *Levitt v. Clark,* 91 Cal. App. 2d 662, 663, 205 P. 2d 747, 748; *King v. Meyer,* 35 Cal. 646, 649; *Grimes v. Nicholson,* 71 Cal. App. 2d 538, 542-543, 162 P. 2d 934, 936.]

The only source to which petitioner alludes as showing compliance with the foregoing prerequisite to review here is a statement by him at the hearing in the trial court to the effect that the trial court had no jurisdiction of the matter. [R. 11, lines 2-13; Pet. 4-5.] This is clearly insufficient. Proper presentation of the constitutional question requires, at the very least, that there be a specification of the section or clause of the Constitution of the United States which it is contended has been or will be violated or some other direct reference which would

have indicated to the trial court the Federal constitutional provision upon which petitioner relied. [*Bowe v. Scott*, 233 U. S. 658, 664-665, 58 L. Ed. 1141, 34 S. Ct. 769; *Yazoo and Miss. R. Co. v. Adams*, 180 U. S. 41, 45, 48, 45 L. Ed. 415, 21 S. Ct. 256.] The purpose to assert a Federal right may not be left to mere inference. [*Oxley Stave Co. v. Butler County*, 166 U. S. 648, 655, 41 L. Ed. 1149, 17 S. Ct. 709.]

III.

Question Presented.

Although the jurisdictional defects to which we have just referred would seem to conclude the matter, we proceed to the substantive phase of the petition.

The question, in that regard, which petitioner attempts to present here is apparently this:

Does a state statute which permits a minor child living with its mother in New York to seek support from its father, a resident of California, violate the equal protection or due process clause of the Fourteenth Amendment of the Constitution, the statute in question being one that authorizes a full hearing to the father in the state of his residence before judgment may be had?

IV.

Statement of Case.

The statement of petitioner omits certain facts which are pertinent here and for that reason we add the following to petitioner's statement of the case:

1. At the time of the decree of divorce obtained by Mrs. Whittlesey, who is the respondent here in her representative capacity on behalf of the minor daughter of the parties, petitioner was in military service and his in-

come was considerably less than at the time of initiation of the present proceeding. [Clk. Tr. 4, 7.]

2. The provisions for support of the minor child included in the Nevada divorce decree of 1942 were predicated upon the then limited income of petitioner. [Clk. Tr. 4, 5.]

3. At the time of commencement of this proceeding, Mrs. Whittlesey and the minor child, Ann, were residents of the State of New York, and petitioner, by then a successful novelist and screen writer, was a resident of the State of California. [Clk. Tr. 3.]

4. Over the years Mrs. Whittlesey attempted as best she could to support the minor child by drawing upon her own resources to augment the small payments being made by petitioner. When Mrs. Whittlesey's own funds were exhausted this proceeding was commenced in New York in accordance with the laws of New York and of California. [Clk. Tr. 1, 6.]

5. The New York court, in adherence to its laws, recommended that the child support be increased from $50 per month to $250 per month and remitted the case to California for further proceedings there. [Clk. Tr. 2, 20; McKinney's Uncon. Laws of New York, Sec. 2116.]

6. Petitioner duly appeared in the California proceeding and the case proceeded to trial, in the usual and customary fashion under California law. [Clk. Tr. 20, 21; R. 1 *et seq.*] In the course of the trial, the court ordered the action dismissed only because it believed the Uniform Reciprocal Enforcement of Support Act inapplicable to this kind of a case. [R. 11.] The District Court of Appeal reversed the order of dismissal and remitted the case for a new trial. [Pet. App. 1-4.] This petition followed.

ARGUMENT.

I.

Petitioner's Contentions Amount to Nothing More Than Disagreement by Him With the Purposes Sought to Be Achieved by Reciprocal Support Acts. The Wisdom of Such Acts, Having Been Laid to Rest by Legislative Action, Is Not a Matter of Judicial Concern.

1. The path followed by petitioner's minor child in seeking to obtain adequate support from her father followed to the letter that prescribed by applicable state laws of the two cooperating states. [Calif. Code Civ. Proc., Secs. 1650-1690; McKinney's Uncon. Laws of New York, Sec. 2111 *et seq.*[1]; Clk. Tr. 1-22.] This case is obviously of the kind which prompted enactment of Reciprocal Enforcement of Support Acts in that the one requiring support is resident in a state other than that in which the one liable for support makes his home. [Commissioner's Prefatory Note, 9A Uniform Laws Annotated (1954 Supp.) 61-64.] Even if the desirability of such legislation were now an open question, petitioner's arguments are those which should be presented, if at all, to the Legislature, not to the Courts. Petitioner is treated no differently than any other father similarly situated whose child seeks support from him under the Act. The equal protection clause requires no more. [*Louisiana ex rel. Francis v. Resweber,* 329 U. S. 459, 465, 91 L. Ed.

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[1]Since the petition does not contain any provisions of the California or New York statutes in question, we have set forth the relevant provisions of the acts in the Appendix hereto.

422, 427, 67 S. Ct. 374, reh. den. 330 U. S. 853, 91 L. Ed. 1295, 67 S. Ct. 673; *Goesaert v. Cleary,* 335 U. S. 464, 466, 93 L. Ed. 163, 165, 69 S. Ct. 198.]

This Court has many times recognized that a wide area of discretion rests with the states in the enactment of legislation enhancing and furthering the rights of women and children. [*West Coast Hotel Co. v. Parrish,* 300 U. S. 379, 81 L. Ed. 703, 57 S. Ct. 578; *Radice v. New York,* 264 U. S. 292, 68 L. Ed. 690, 44 S. Ct. 325; *Sturges & Burn Mfg. Co. v. Beauchamp,* 231 U. S. 320, 58 L. Ed. 245, 34 S. Ct. 60.] Despite the existence of this fundamental principle, and in disregard of the salutary and socially desirable features of Reciprocal Enforcement of Support Laws, such acts have been subjected to constitutional attack on almost every ground, including asserted denial of equal protection and lack of due process, which the ingenuity of the defending parent might conceive. Nonetheless the constitutionality of the Reciprocal Enforcement of Support Laws has been consistently upheld. [*Smith v. Smith,* 125 Cal. App. 2d 154, 270 P. 2d 613; *Smith v. Smith,* 131 A. C. A. (Advance Cal. App.) 917, 281 P. 2d 274; *Duncan v. Smith,* ..... Ky. ....., 262 S. W. 2d 373; *Potter v. Potter,* ..... Col. ....., 278 P. 2d 1020; *Freeman v. Freeman,* ..... La. ....., 76 So. 2d 414; *Comm. of Pennsylvania v. Warren,* ..... Md. ....., 105 A. 2d 488. See: *Mahan v. Read,* ..... N. Car. ....., 83 S. E. 2d 706. *Cf. Comm. of Pennsylvania v. Mong,* 116 Ohio St. 455, 117 N. E. 2d 32, decided on the basis of difference in law between the cooperating states, a factor not present in the instant case.]

II.

Since Petitioner Had, and Availed Himself of the Opportunity to Be Fully Heard Before the Trial Court, No Lack of Due Process Exists.

The Constitution does not require resort to any single specific procedure in a state court trial. It is enough that an adequate procedure is provided. The legislature has a wide range of selection in this regard. [*Dohany v. Rogers,* 281 U. S. 362, 369, 74 L. Ed. 904, 912, 50 S. Ct. 299, and cases there cited; *Neblett v. Carpenter,* 305 U. S. 297, 305, 83 L. Ed. 182, 189, 59 S. Ct. 170; *Hooker v. Los Angeles,* 188 U. S. 314, 318, 47 L. Ed. 487, 23 S. Ct. 395.]

Petitioner is given ample opportunity, on due and proper notice, to present his case fully under the Reciprocal Act. [Calif. Code Civ. Proc., Secs. 1680-1682.] The fact that the case began in New York, as it must to serve the purposes and objectives of the Act, is of no constitutional significance. The New York court may only recommend preliminarily. The California court is not bound to accept that recommendation. [Calif. Code Civ. Proc., Secs. 1674, 1682-1683; *Smith v. Smith, supra,* 125 Cal. App. 2d at 166, 270 P. 2d at 622.] As a matter of constitutional law, the opportunity to be heard need not come before entry of some intermediate or interlocutory order; it is enough if, at some time before final decision, that opportunity is afforded. [*American Surety Co. v. Baldwin,* 287 U. S. 156, 168, 77 L. Ed. 231, 239, 53 S. Ct. 98, and cases there cited.]

The contentions of petitioner as to the claimed lack of due process are ably, completely and concisely answered in *Smith v. Smith, supra,* 125 Cal. App. 2d at 168, 270 P. 2d at 623, as follows:

> "That there is no deprivation of due process is clear. When the court of this state receives the papers from the initiating state the defendant is given notice, an opportunity to be heard, by deposition to examine and cross-examine the plaintiff and any witness that may have testified in the initiating state, to examine and cross-examine any witnesses that may testify in this state, to meet opposing evidence, and to oppose with evidence. Thus the requirements of due process are complied with. (*Morgan v. United States,* 304 U. S. 1 [58 S. Ct. 773, 82 L. Ed. 1129].)"

Conclusion.

Certiorari is sought here from a judgment not now final. The constitutional question presently invoked was not properly or timely raised below. The objections raised to the state court decision are utterly devoid of merit. For each of these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

JOSEPH P. LOEB,
Attorney for Respondent.

HERMAN F. SELVIN,
ALLEN E. SUSMAN,
Of Counsel.

APPENDIX.

California Uniform Reciprocal Enforcement of Support Act.

[Cal. Stats. 1951, Ch. 694, pp. 1906-1909, amended by Cal. Stats. 1953, Ch. 1290, pp. 2844-2848; codified in the Cal. Code Civ. Proc. as Title 10A, Secs. 1650-1690, incl.]

Title 10a

Uniform Reciprocal Enforcement of Support Act

Chapter 1

General Provisions

§1650. [Citation of title.] This title is known and may be cited as the Uniform Reciprocal Enforcement of Support Act.

§1651. [Construction.] This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

§1651. [Purpose of title.] The purposes of this title are to improve and extend by reciprocal legislation the enforcement of duties of support and to make uniform the law with respect thereto.

§1653. [Definitions.] As used in this title unless the context requires otherwise,

(1) "State" includes any state, territory or possession of the United States and the District of Columbia in which this or a substantially similar reciprocal law has been enacted.

(2) "Initiating state" means any state in which a proceeding pursuant to this or a substantially similar reciprocal law is commenced.

(3) "Responding state" means any state in which any proceeding pursuant to the proceeding in the initiating state is or may be commenced.

(4) "Court" means the superior court and when the context requires, means the court of any other state as defined in a substantially similar reciprocal law.

(5) "Law" includes both common and statute law.

(6) "Duty of support" includes any duty of support imposed or imposable by law, or by any court order, decree or judgment, whether interlocutory or final, whether incidental to a proceeding for divorce, judicial separation, separate maintenance or otherwise.

(7) "Obligor" means any person owing a duty of support.

(8) "Obligee" means any person to whom a duty of support is owed.

(9) "Prosecuting official" means the district attorney, city attorney, or city prosecutor charged with the prosecution of criminal offenses in the city or other area in which the obligor is alleged to be present.

§1654. [Remedies to be in addition to other remedies.] The remedies provided in this title are in addition to and not in substitution for any other remedies.

§1655. [Obligor bound by duty of support regardless of presence or residence.] Duties of support arising under the law of this State, when applicable under Section 1670, bind the obligor, present in this State, regardless of the presence or residence of the obligee.

* * * * * * * * *

CHAPTER 3
Civil Enforcement

§1670. [Duties of support enforceable.] Duties of support enforceable under this title are those imposed or imposable under the laws of any state where the alleged obligor was present during the period for which support is sought or where the obligee was present when the failure to support commenced, at the election of the obligee.

* * * * * * * * *

§1672. [Duties of support enforceable by action: Jurisdiction.] All duties of support are enforceable by action irrespective of relationship between the obligor and obligee. Jurisdiction of all proceedings hereunder shall be vested in the superior court.

§1673. [Verification and contents of complaint.] The complaint shall be verified and shall state the name and, so far as known to the plaintiff, the address and circumstances of the defendant and his dependents for whom support is sought and all other pertinent information.
* * *

§1674. [Representation of plaintiff by prosecuting official.] The prosecuting official may, upon the request of the court, represent the plaintiff in any proceeding under this title.

§1675. [Who may bring complaint on behalf of minor obligee.] A complaint on behalf of a minor obligee may be brought by a person having legal custody of the minor without appointment as guardian *ad litem*.

* * * * * * * * *

§1680. [Proceedings upon receipt of copies of complaint, certificate and act.] When the court of this State,

acting as a responding state, receives from the court of an initiating state the aforesaid copies, it shall (1) docket the cause, (2) notify the prosecuting official, (3) set a time and place for a hearing, and (4) take such action as is necessary in accordance with the laws of this State to obtain jurisdiction.

* * * * * * * * *

§1682. [Manner of conducting proceedings.] The court shall conduct proceedings under this title in the manner prescribed by law for an action for the enforcement of the type of duty of support claimed.

§1683. [Order to furnish support or reimbursement.] If the court of the responding state finds a duty of support, it may order the defendant to furnish support or reimbursement therefor and subject the property of the defendant to such order.

§1684. [Court acting as responding state: Transmission of copies of orders of support or for reimbursement to initiating state.] The court of this State when acting as a responding state shall cause to be transmitted to the court of the initiating state a copy of all orders of support or for reimbursement therefor.

§1685. [Same: Subjection of defendant to terms and conditions.] In addition to the foregoing powers, the court of this State, when acting as the responding state has the power to subject the defendant to such terms and conditions as the court may deem proper to assure compliance with its orders and in particular

(a) To require the defendant to furnish recognizance in the form of a cash deposit or bond of such character and in such amount as the court may deem proper to as-

sure payment of any amount required to be paid by the defendant.

(b) To require the defendant to make payments at specified intervals to the probation officer of the county or the obligee and to report personally to such probation officer at such times as may be deemed necessary.

(c) To punish the defendant who shall violate any order of the court to the same extent as is provided by law for contempt of the court in any other suit or proceeding cognizable by the court.

§1686. [Same: Duties which may be carried out through probation officer.] The court of this State when acting as a responding state shall have the following duties which may be carried out through the probation officer of the county:

(a) Upon the receipt of a payment made by the defendant pursuant to any order of the court or otherwise, to transmit the same forthwith to the court of the initiating state, and

(b) Upon request to furnish to the court of the initiating state a certified statement of all payments made by the defendant.

* * * * * * * * *

§1689. [Order of support not to supersede previous support orders in other actions.] Any order of support issued by a court of this State when acting as a responding state shall not supersede any previous order of support issued in a divorce or separate maintenance action, but the amounts for a particular period paid pursuant to either order shall be credited against amounts accruing or accrued for the same period under both.

§1690. [Participation in proceedings under title not to confer court jurisdiction in other proceedings.] Participation in any proceedings under this title shall not confer upon any court jurisdiction of any of the parties thereto in any other proceeding.

NEW YORK UNIFORM SUPPORT OF DEPENDENTS LAW

[Laws 1949, Ch. 807, as amended by Laws 1950, Ch. 401, Laws 1953, Chs. 443, 456; Laws 1954, Ch. 721; McKinney Uncon. Laws of N. Y., Secs. 2111-2120, incl.]

§2111. Short title; purpose.

This act may be cited and referred to as the uniform support of dependents law.

The purpose of this uniform act is to secure support in civil proceedings for dependent wives, children and poor relatives from persons legally responsible for their support.

§2112. Definitions.

As used in this act, unless the context shall require otherwise, the following terms shall have the meanings ascribed to them by this section:

(a) "State" shall mean and include any state, territory or possession of the United States and the District of Columbia.

(b) "Court" shall mean and include the domestic relations court of the city of New York, the children's court in any county outside the city of New York, whether established as a separate court or as a part or division of the county court, and a municipal court; when the context requires it shall mean and include a court of another state defined in and upon which appropriate jurisdiction

has been conferred by a substantially similar reciprocal law.

(c) "Child" includes a step child, foster child, child born out of wedlock or legally adopted child and means a child actually or apparently under seventeen years of age, and a child over seventeen years of age who is unable to maintain himself and is likely to become a public charge.

(d) "Dependent" shall mean and include a wife or child who is in need of and entitled to support from a person who is declared to be legally liable for such support by the laws of the state or states wherein the petitioner and the respondent reside.

(e) "Petitioner" shall mean and include each dependent person for whom support is sought in a proceeding instituted pursuant to this act.

(f) "Respondent" shall mean and include each person against whom a proceeding is instituted pursuant to this act.

(g) "Petitioner's representative" shall mean and include a corporation counsel, county attorney, state's attorney, commonwealth attorney and any other public officer, by whatever title his public office may be known, charged by law with the duty of instituting, maintaining or prosecuting a proceeding under this act or under the laws of the state or states wherein the petitioner and the respondent reside.

(h) "Summons" shall mean and include a subpoena, warrant, citation, order or other notice, by whatever name known, provided for by the laws of the state or states wherein the petitioner and the respondent reside as the means for requiring the appearance and attendance in court of the respondent in a proceeding instituted pursuant to this act.

(i) "Initiating state" shall mean the state of domicile or residence of the petitioner.

(j) "Responding state" shall mean the state wherein the respondent resides or is domiciled or found.

§2113. Persons legally liable for support of dependents.

For the purpose of this act:

(a) A husband in one state is hereby declared to be liable for the support of his wife and any child or children under seventeen years of age and any other dependent residing or found in the same state or in another state having substantially similar or reciprocal laws, and, if possessed of sufficient means or able to earn such means, may be required to pay for their support a fair and reasonable sum according to his means, as may be determined by the court having jurisdiction of the respondent in a proceeding instituted under this act.

* * * * * * * * *

(g) Notwithstanding the fact that the respondent has obtained in any state or county a final decree of divorce or separation from his wife or a decree dissolving his marriage, the respondent shall be deemed legally liable for the support of any dependent child of such marriage.

* * * * * * * * *

§2114. Jurisdiction and powers of court.

For the purposes of this act:

(a) The court shall have jurisdiction regardless of the state of last residence or domicile of the petitioner and the respondent and whether or not the respondent has ever been a resident of the initiating state or the dependent person has ever been a resident of the responding state.

(b) The court of the responding state shall have the power to order the respondent to pay sums sufficient to provide necessary food, shelter, clothing, care, medical or hospital expenses, expenses of confinement, expenses of education of a child, funeral expenses and such other reasonable and proper expenses of the petitioner as justice requires, having due regard to the circumstances of the respective parties.

(c) The courts of both the initiating state and the responding state shall have the power to order testimony to be taken in either or both of such states by deposition or written interrogatories, and to limit the nature of and the extent to which the right so to take testimony shall be exercised, provided that the respondent is given a full and fair opportunity to answer the allegations of the petitioner.

§2115. Cases in which proceedings are maintainable.

A proceeding to compel support of a dependent may be maintained under this act in any of the following cases:

(a) Where the petitioner and the respondent are residents of or domiciled or found in the same state.

(b) Where the petitioner resides in one state and the respondent is a resident of or is domiciled or found in another state having substantially similar or reciprocal laws.

(c) Where the respondent is not and never was a resident of or domiciled in the initiating state and the petitioner resides or is domiciled in such state and the respondent is believed to be a resident of or domiciled in another state having substantially similar or reciprocal laws.

(d) Where the respondent was or is a resident of or domiciled in the initiating state and has departed or de-

parts from such state leaving therein a dependent in need of and entitled to support under this act and is believed to be a resident of or domiciled in another state having substantially similar or reciprocal laws.

* * * * * * * * *

§2116. Procedure.

(a) A proceeding under this act shall be commenced by a petitioner by filing a verified petition in the court in the county of the state wherein he resides or is domiciled, showing the name, age, residence and circumstances of the petitioner, alleging that he is in need of and is entitled to support from the respondent, giving his name, age, residence and circumstances, and praying that the respondent be compelled to furnish such support.

(b) If the respondent be a resident of or domiciled in such state and the court has or can acquire jurisdiction of the person of the respondent under existing laws in effect in such state, such laws shall govern and control the procedure to be followed in such proceeding.

(c) If the respondent be not a resident of or domiciled in or cannot be found in such state, a judge of such court shall certify that a verified petition has been filed in his court in a proceeding against the respondent under this act to compel the support of the petitioner, that a summons, duly issued out of his court for service upon the respondent has been returned with an affidavit to the effect that the respondent cannot with due diligence be located or served with such process in the initiating state, that the respondent is believed to be residing or domiciled in the responding state and that, in his opinion, the respondent should be compelled to answer such petition and should be dealt with according to law, and he shall trans-

mit such certificate and certified copies of such petition and summons to the appropriate court in the responding state.

(d) Any judge of a court in the county of the responding state in which the respondent resides or is domiciled or found, upon presentation to him of such certificate and certified copies of such petition and summons, shall fix a time and place for a hearing on such petition and shall issue a summons out of his court, directed to the respondent, duly requiring him to appear at such time and place.

(e) It shall not be necessary for the petitioner or the petitioner's witnesses to appear personally at such hearing, but it shall be the duty of the petitioner's representative of the responding state to appear on behalf of and represent the petitioner at all stages of the proceeding.

(f) If at such hearing the respondent controverts the petition and enters a verified denial of any of the material allegations thereof, the judge presiding at such hearing shall stay the proceedings and transmit to the judge of the court in the initiating state a transcript of the clerk's minutes showing the denials entered by the respondent.

(g) Upon receipt by the judge of the court in the initiating state of such transcript, such court shall take such proof, including the testimony of the petitioner and the petitioner's witnesses and such other evidence as the court may deem proper, and, after due deliberation, the court shall make its recommendation, based on all of such proof and evidence, and shall transmit to the court in the responding state a certified transcript of such proof and evidence and of its proceedings and recommendation in connection therewith.

(h) Upon the receipt of such transcript, the court in the responding state shall resume its hearing in the proceeding and shall give the respondent a reasonable opportunity to appear and reply.

(i) Upon the resumption of such hearing, the respondent shall have the right to examine or cross-examine the petitioner and the petitioner's witnesses by means of depositions or written interrogatories, and the petitioner shall have the right to examine or cross-examine the respondent and the respondent's witnesses by means of depositions or written interrogatories.

(j) If a respondent, duly summoned by court in the responding state, wilfully fails without good cause to appear as directed in the summons, he shall be punished in the same manner and to the same extent as is provided by law for the punishment of a defendant or witness who wilfully disobeys a summons or subpoena duly issued out of such court in any other action or proceeding cognizable by said court.

(k) If, on the return day of the summons, the respondent appears at the time and place specified therein, and fails to answer the petition or admits the allegations thereof or, if, after a hearing has been duly held by the court in the responding state in accordance with the provisions of this section, such court has found and determined that the prayer of the petitioner, or any part thereof, is supported by the evidence adduced in the proceeding, and that the petitioner is in need of and entitled to support from the respondent, the court shall make and enter an order directing the respondent to furnish support to the petitioner and to pay therefor such sum as the court shall determine, having due regard to the parties' means and circumstances. A certified copy of such order

shall be transmitted by the court to the court in the initiating state and such copy shall be filed with and made a part of the records of such court in such proceeding. * * *

* * * * * * * * *

§2116-a. Appeals; effectiveness of orders.

Any respondent in a proceeding brought under the provisions of this act shall have the same right of appeal as in civil proceedings or actions brought in the same court. Any order for support made by the court shall not be affected by an appeal but shall continue in effect until the appeal is decided and thereafter, if the order is affirmed, until changed by further order of the court.

§2117. Duty of petitioners' representatives.

It shall be the duty of all petitioners' representatives of this state to appear in this state on behalf of and represent the petitioner in every proceeding pursuant to this act, at the time the petition is filed and at all stages of the proceeding thereafter, and to obtain and present such evidence or proof as may be required by the court in the initiating state or the responding state.

* * * * * * * * *

§2118. Construction of act.

1. This act shall be construed to furnish an additional or alternative civil remedy and shall in no way affect or impair any other remedy, civil or criminal, provided in any other statute and available to the petitioner in relation to the same subject matter.

2. This act shall not be construed to confer jurisdiction on the court of the initiating or responding state in any pending or future action for divorce, legal separation or annulment.

§2119. Uniformity of interpretation.

This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of the states which enact it.

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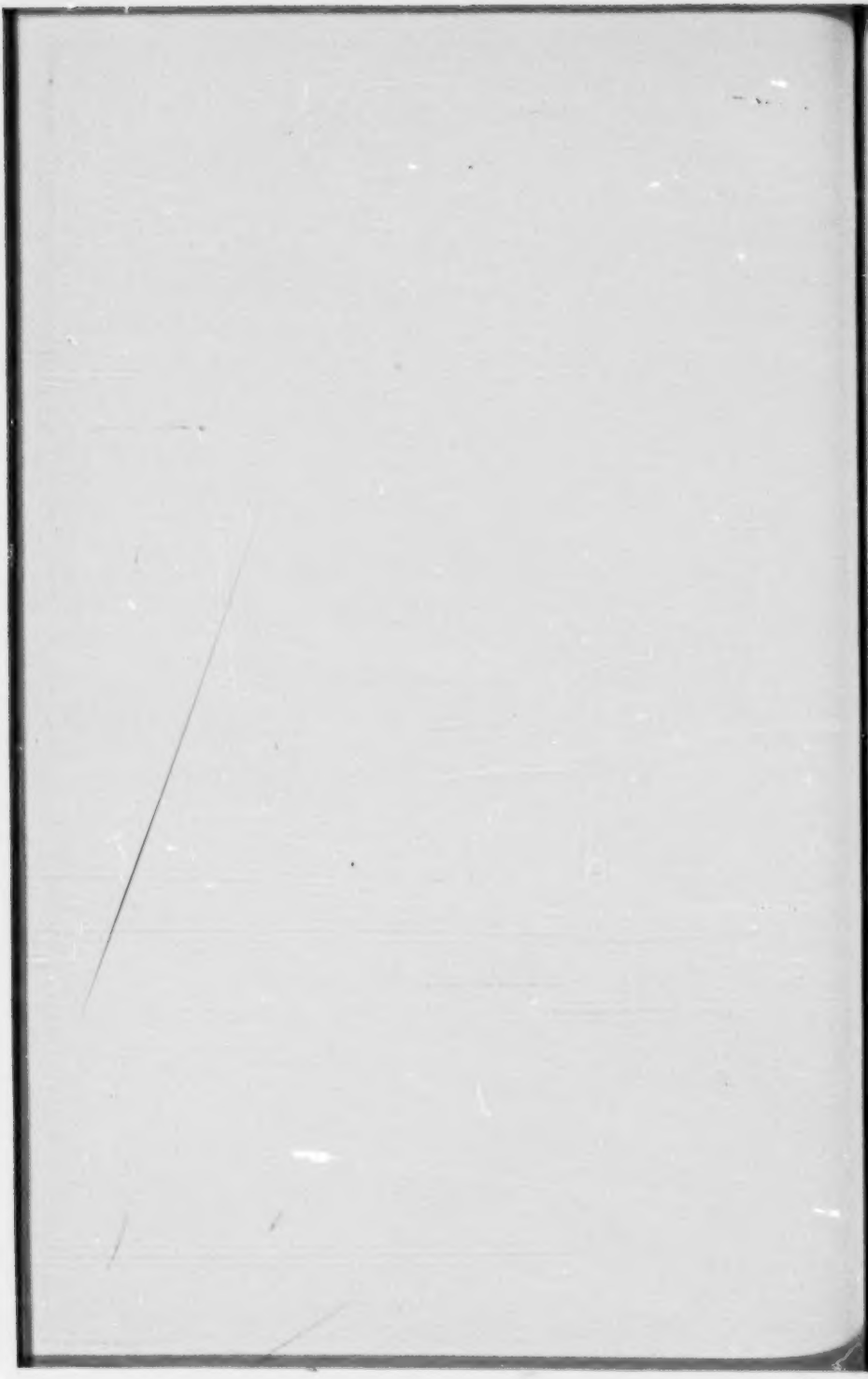

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IN THE

Supreme Court of the United States

October Term, 1954—No. 784

October Term, 1955—No. 67

JAMES WARNER BELLAH,

Petitioner,

vs.

RUTH POWER-O'MALLEY WHITTLESEY, Mother on behalf of ANN DE LA POER BELLAH,

Respondent.

PETITIONER'S REPLY BRIEF.

Petitioner will follow generally the order in which Respondent raised the points at issue in this cause. Respondent first urges that this Court should not assume jurisdiction, and then concludes with the argument that in any event Petitioner does not have a meritorious case.

I.

The Question of Jurisdiction.

A. Finality of the Judgment.

In connection with the matter of jurisdiction, the first point raised by Respondent is that the judgment below was not final, at least for the purposes of review by the Supreme Court. The answer to this argument is two-fold:

(1) It is not applicable where the very right to maintain the suit is based on a point of jurisdiction. In *Meyers v. Bethlehem Corporation,* 303 U. S. 41, 52, 82 L. Ed. 638, 645, the Supreme Court said that the rule that a decision must be final

> "has no application where, as here, there was an insuperable objection to the maintenance of the suit in point of jurisdiction, and where it clearly appears that the decree was the result of an improvident exercise of judicial discretion."

It will be recalled that the petitioner-defendant moved for a dismissal in the trial court on the precise ground of lack of jurisdiction. [Rep. Tr. p. 11, lines 2-13.]

(2) In addition, certiorari will be granted where even though the judgment might be considered "non-final," a novel and important question of law is presented.

> *American Construction Co. v. Jackson T. K. & R. Co.,* 148 U. S. 372, 37 L. Ed. 486;
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> *Larsen v. Domestic and Foreign Commerce Corp.,* 337 U. S. 682, 685 (Note 3), 93 L. Ed. 1628.

Land v. Dollar, 330 U. S. 731, 734 (Note 2), 91 L. Ed. 1209, in which the court held that a judgment of dismissal may not be "final" but it will be reviewed if it "involves an issue 'fundamental to the further conduct of the case.' "

B. Was a "Federal" Question Raised?

The Respondent then urges that the federal question was not raised in the proceedings prior to the inauguration of the present petition for writ of certiorari. While it is true that in the earlier years of this court the rule was that the federal question would not be deemed to have been raised unless precise chapter and verse of the sec-

tion of the constitution involved were urged in the lower courts, it appears to be the present status of the law that if a right under the constitution of the United States is necessarily involved,

> "it is not always necessary to refer to the precise words or to the particular section of the constitution under which some right, title, privilege or immunity is claimed, and that it is sufficient if it appears affirmatively from the record that a right, title, privilege or immunity is specifically set up or claimed under that instrument or under the authority of the United States."
>
> *Oxley v. Butler,* 166 U. S. 648, 41 L. Ed. 1149.

If a right under the constitution of the United States is necessarily involved in the determination of the case a writ will not be denied.

Hulbert v. Chicago, 202 U. S. 275, 50 L. Ed. 1026.

Incidentally, both of the above cases were cited by Respondent in her brief.

II.
The Merits.

In her discussion of the merits of the case, Respondent poses the question involved (Resp. Br. p. 4). Petitioner can hardly accept Respondent's version of the question involved since it assumes the very premises which are at issue in this case, omitting as it does the point that the "initiating" court made a determination of the amount to be paid by petitioner, and the further point that the statute involved purports to cover *all* fathers and not merely fathers who are in default of their obligation, or who flee the jurisdiction.

A. Was Petitioner Accorded Equal Protection of the Law?

Again following the order pursued by Respondent's brief, the first point to be considered is whether or not Petitioner received equal protection of the law. It has been well stated that

> "the generalities on the subject (equal protection) are not in dispute; their application turns peculiarly on the particular circumstances of a case."

The very cases cited by Respondent (Resp. Br. p. 7), dealing as they do with ameliorating working conditions of women and children, indicate there can be no objection of lack of equal protection of law if the legislation hits "the evil where it is most felt"; likewise they point up the principle that it is the application of the laws to the particular party involved which raises the constitutional question.

Consequently, the argument raised in Respondent's brief that Petitioner should go to the legislature and not to the courts is specious. Petitioner has no particular quarrel with the language of the statute, but his position was and is that it cannot apply to him since it was beyond the intent and the purpose of the Act that it be applied to him. Respondent urges that Petitioner is being treated no "differently than any other father similarly situated whose child seeks support from him under the Act." (Resp. Br. p. 6.) This point is basic and is the other face of the precise argument which Petitioner raises. Petitioner is not "similarly situated" to the fathers intended to be covered by the Act. It is significant that in none of the cases cited by Respondent (Resp. Br. p. 7), nor which Petitioner has been able to find, are there any in which the Reciprocal Act was attempted to be enforced unless the father was actually fleeing jurisdiction, was in de-

fault of an existing order, or where an order had never in fact been made. Petitioner is in none of these categories. Interesting and significant language is used in one of the cases cited by Respondent, and in one brief paragraph this case not only gives the intent but the philosophy of the Reciprocal Act.

> "It is an ironical development that the first case to reach this Court under our Uniform Reciprocal Enforcement of Support Act should be predicated upon a factual situation wholly different from the typical case posing the acute problem that gave rise to the legislation. Such acute problem was the situation where a deserting husband and father abandons his family and flees to another jurisdiction and thereby escapes his obligation—because the wife and children have neither the facilities nor the means to pursue him and institute suit in the state in which he chooses to establish a new residence. In fact, some of the popular names given the act are The Skippers Act, The Running Away Fathers Law, The Disappearing Pappy's Bill, and The Fugitive Husbands Law. Alabama Law Review, Vol. V, No. 2, Spring 1953, article 'Alabama's Reciprocal Nonsupport Legislation' by Mary A. Lee. See also 29 N. C. L. R. 423, *et seq.* The case before us presents the problem of the *roving obligee,* rather than of the *fugitive obligor.*" (Emphasis the court's.)
>
> *Mahan v. Reed,* 240 N. E. 641, 83 S. E. 2d 706.

B. Was Petitioner Accorded Due Process?

The final point raised in Respondent's brief is that of due process. Petitioner has carefully read the cases cited in Respondent's brief on this point (Resp. Br. pp. 8-9) and they contain nothing inconsistent with the points raised by Petitioner in his Petition. In every one of the

cases cited by Respondent the defendant had obtained ample notice and opportunity to defend before any judicial steps were taken against him. For example in *Doliany v. Rogers,* 281 U. S. 362, 74 L. Ed. 904 (cited on p. 8 of Resp. Br.), the court said it was enough if a party had reasonable notice and a "reasonable opportunity to be heard and to present his claim or defense." It is submitted that as applied to Petitioner herein, such minimum requirements were not followed.

Conclusion.

The question presented in this case is not only novel but extremely important. Fundamental constitutional concepts are involved and it is Petitioner's position that the Act, if it be applied to him, deprives him of such constitutional safeguards. For these reasons, his petition for a writ of certiorari should be granted, and the Court should consider the case on its merits.

Respectfully submitted,

HARRY GRAHAM BALTER,

Attorney for Petitioner.